



Virginia
Regulatory
Town Hall

Proposed Regulation Agency Background Document

Agency Name:	Virginia Department of Environmental Quality
VAC Chapter Number:	9VAC25-760-10 et seq.
Regulation Title:	James River (Richmond Regional West) Surface Water Management Area
Action Title:	Designation of the James River (Richmond Regional West) Surface Water Management Area
Date:	June 28, 2002

This information is required pursuant to the Administrative Process Act (§ 9-6.14:9.1 *et seq.* of the *Code of Virginia*), Executive Order Twenty-Five (98), Executive Order Fifty-Eight (99), and the *Virginia Register Form, Style and Procedure Manual*. Please refer to these sources for more information and other materials required to be submitted in the regulatory review package.

Summary*

Please provide a brief summary of the proposed new regulation, proposed amendments to an existing regulation, or the regulation proposed to be repealed. There is no need to state each provision or amendment or restate the purpose and intent of the regulation; instead give a summary of the regulatory action and alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.

The proposed regulation defines the boundaries of the James River (Richmond Regional West) Surface Water Management Area to include the mainstem and all tributaries of the James River Between the Route 522 bridge in Powhatan County and the Route 95 bridge in the city of Richmond. The proposed regulation also establishes flow conditions below which permit conditions within the area will become effective. If designated, all users of more than 300,000 gallons per month will be required to obtain a certificate or permit in accordance with the existing Surface Water Management Area Regulation (VAC25-220-10 et seq.). Conditions of

permits may include limitations on the volume that may be withdrawn, limitations on withdrawals based on instream flows, and monitoring and reporting requirements. If designated, all users that are subject to permit and certificate requirements will be required to develop and implement a water conservation plan.

Basis*

Please identify the state and/or federal source of legal authority to promulgate the regulation. The discussion of this statutory authority should: 1) describe its scope and the extent to which it is mandatory or discretionary; and 2) include a brief statement relating the content of the statutory authority to the specific regulation. In addition, where applicable, please describe the extent to which proposed changes exceed federal minimum requirements. Full citations of legal authority and, if available, web site addresses for locating the text of the cited authority must be provided. Please state that the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the proposed regulation and that it comports with applicable state and/or federal law.

The basis for this proposal is §62.1-242 et seq. of the code of Virginia. Specifically, §62.1-246 authorizes the Board to declare surface water management areas and establishes the criteria that must be met to consider an area for designation. This section further requires that the State Water Control Board hold a public hearing if the criteria for designation are met and requires the Board to designate the area if the results of the public hearing indicate that the protection of public welfare, health and safety require that regulatory efforts be initiated. This area has been under consideration since 1990 and a technical advisory committee composed of local government representatives, commercial and industrial users, and environmental interest groups generally agreed that the criteria for designation were met. There are no federal requirements regarding the allocation of water resources. The full text containing the legal authority for this action can be found beginning with <http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+62.1-242>.

Purpose*

Please provide a statement explaining the need for the new or amended regulation. This statement must include the rationale or justification of the proposed regulatory action and detail the specific reasons it is essential to protect the health, safety or welfare of citizens. A statement of a general nature is not acceptable, particular rationales must be explicitly discussed. Please include a discussion of the goals of the proposal and the problems the proposal is intended to solve.

The purpose of a surface water management area is to provide for the protection of beneficial uses of the designated waters of the Commonwealth during periods of low surface water flows by managing the withdrawal of surface waters. The proposed regulatory action is to designate the James River near Richmond as a surface water management area. The proposed area includes the James River and all its tributaries between the Route 522 bridge in Powhatan and the Route 95 bridge in Richmond.

The James River has been designated a Scenic River for its aesthetic, cultural, and recreational opportunities. It serves as the sole source of water supply for residents and several industrial facilities in the City of Richmond and major portions of Chesterfield, Henrico, Goochland, and Hanover Counties. The river also supports an exceptional habitat for anadromous fish and aquatic life, including the American Shad.

After designation no withdrawals of more than 300,000 gallons per month will be allowed without a surface water withdrawal permit unless the withdrawals are specifically exempted in §62.1-243 or the withdrawals are subject to a voluntary agreement among users that has been approved by the Board. All persons withdrawing water within the area in excess of 300,000 gallons per month will also be required to develop and implement water conservation and management plans. Conditions may be established in permits that limit water withdrawal amounts, limit withdrawals above certain specified low flow conditions, and establish monitoring and reporting requirements. These limitations will only be in effect during periods of defined low flow conditions.

Substance*

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. Please note that a more detailed discussion is required under the statement providing detail of the regulatory action's changes.

The proposed regulation will designate the James River and its tributaries between the Route 522 bridge in Powhatan and the Route 95 bridge in Richmond as a surface water management area. The regulation will require all non-exempt users who withdraw more than 300,000 gallons per month to obtain either a certificate, a permit, or to participate in a voluntary agreement with other users that will limit withdrawals during periods of low flow.

Issues*

Please provide a statement identifying the issues associated with the proposed regulatory action. The term "issues" means: 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions; 2) the primary advantages and disadvantages to the agency or the Commonwealth; and 3) other pertinent matters of interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, please include a sentence to that effect.

The proposed regulation will manage withdrawals from the James River between the Route 522 bridge and the Route 95 bridge during time of low flows to assure the equitable utilization of the resource by competing users and to assure the protection of significant instream values, including the protection of aquatic habitats and recreational opportunities. In the issuance of permits the Board must attempt to equitably balance offstream and instream uses so that the welfare of the citizens of the area is maximized without imposing unreasonable burdens on individual water users or water-user groups. There may be disadvantages to some groups of water users in order to assure the resource supports domestic use by all users of the resource and

that significant instream values are protected. The application of the proposed regulation will benefit the Commonwealth by assuring the continuity of water supplies in the Richmond metropolitan area during periods of low flow in the James River. The proposed regulation poses no disadvantages to the Commonwealth. Finally, the proposed regulation will serve as a mechanism to assure that parties to voluntary agreements regarding the use of the James River in this area comply with those agreements.

Locality Particularly Affected*

Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.

When compared to other localities in the Commonwealth, the localities that border the proposed surface water management area will be particularly affected by the proposed regulation. These localities include the counties of Powhatan, Goochland, Henrico, and Chesterfield and the city of Richmond. In addition, localities that purchase water supplies from these counties will also be impacted by voluntary and mandatory restrictions on water use during times of low flows. These secondary impacts would only occur in the service area of the public water systems that receive water from one of the primary localities.

Public Participation*

Please include a statement that in addition to any other comments on the proposal, the agency is seeking comments on the costs and benefits of the proposal.

The Board is seeking comments on all aspects of the proposed regulation including the necessity of the regulation for the protection of public welfare, safety and health; the proposed boundaries of the surface water management area; and the proposed trigger flows required to activate the area and to require water conservation action. In addition the Board is seeking comments on the costs and benefits of the proposal and the impacts of the regulation on farm and forestlands.

Pending approval of the draft regulation by the Board a public hearing will be held. Notice of the public hearing will be posted in the Calendar of Events section of the Virginia Register of Regulations and advertised in the Richmond Times Dispatch. These notices will contain the date and time of the public hearing as well as the closing date of the public comment period. Anyone wishing to submit written comments for the public comment file may do so at the public hearing or by mail. Written comments should be signed by the commentor and include the name and address of the commentor. In order to be considered the comments must be received by the close of the comment period. Oral comments may be submitted at the public hearing.

Fiscal Impact

Please identify the anticipated fiscal impacts and at a minimum include: (a) the projected cost to the state to implement and enforce the proposed regulation, including (i) fund source / fund detail, (ii) budget activity with a cross-reference to program and subprogram, and (iii) a delineation of one-time versus on-going expenditures; (b) the projected cost of the regulation on localities; (c) a description of the individuals, businesses or other entities that are likely to be affected by the regulation; (d) the agency's best estimate of the number of such entities that will be affected; e) the projected cost of the regulation for affected individuals, businesses, or other entities; and f) an estimate of the impact of the proposed regulation upon small businesses as defined in § 9-199 of the Code of Virginia or organizations in Virginia.

It is anticipated that DEQ will implement and enforce the proposed regulation with existing resources contained in the Water Supply Planning Program (Program 51303, general funds). The only cost of this draft regulation on localities will be costs associated with localities that have or initiate a surface water withdrawal and are required to obtain a certificate or permit. Persons who are required to obtain new or expanded surface water withdrawal permits for non-agricultural uses will be required to pay a \$9000 permit fee. Persons who are required to obtain a surface water withdrawal permit for existing (pre-1989) non-agricultural uses will be required to pay a \$6000 fee. Persons who are required to obtain permits or certificates for agricultural uses are exempt from permit fees. It is estimated that the completion of a permit or certificate application for a complex withdrawal (i.e. major public water supply withdrawal) will require less than forty hours. Applications for smaller, simpler withdrawals (i.e. small agricultural withdrawal) will require significantly less time. Any entity that withdraws more than 300,000 gallons of surface water within the proposed area will be required to obtain a certificate or permit. It is estimated that less than 20 entities will be required to obtain certificates or permits. This estimate includes all existing known users as well as an allowance for small currently unknown agricultural users. The only known or suspected small businesses that may be impacted by this proposed regulation are agricultural users. The impacts on these users are expected to only be the time associated with completion of an application (significantly less than 40 hours) and time associated with monitoring withdrawals when permit conditions are in force. Should low flow conditions prevail for extended periods of time, there is the potential for agricultural users who may be required to limit withdrawals to experience reduction in yields due to reductions in their ability to irrigate. This potential impact can not be quantified.

Detail of Changes

Please detail any changes, other than strictly editorial changes, that are being proposed. Please detail new substantive provisions, all substantive changes to existing sections, or both where appropriate. This statement should provide a section-by-section description - or cross-walk - of changes implemented by the proposed regulatory action. Where applicable, include citations to the specific sections of an existing regulation being amended and explain the consequences of the proposed changes.

The proposed regulation will designate the James River and its tributaries between the Route 522 bridge in Powhatan and the Route 95 bridge in Richmond as a surface water management area.

The regulation will require all non-exempt users who withdraw more than 300,000 gallons per month to obtain either a certificate, a permit, or to participate in a voluntary agreement with other users that will limit withdrawals during periods of low flow. The draft regulation defines low flow conditions to exist when the James River gage at Cartersville records a 14 day rolling average flow that is less than 2142 cubic feet per second. The draft regulation also defines the end of low flow conditions as a period of thirty consecutive days when the 14-day rolling average flow at Cartersville exceeds 2142 cubic feet per second. All permits must be issued in accordance with 9VAC25-220-10 et seq., Surface Water Management Area Regulations. This draft regulation specifically requires that permitted public water supplies initiate voluntary conservation measures when the 14 day rolling average at Cartersville drops below 1428 cubic feet per second and initiate mandatory conservation measures when the 14 day rolling average at Cartersville drops below 714 cubic feet per second. In addition all other permitted users will be required to limit withdrawals when the 14 day rolling average at Cartersville drops below 1428 cubic feet per second. The magnitude and nature of these limitations will be dependent on the specific beneficial use to which the withdrawal is applied.

Alternatives

Please describe the specific alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action.

The Board considered three options to address the equitable protection of offstream and instream uses during periods of low flow:

Alternative 1: Designate the James River near Richmond a surface water management area. The Surface Water Management Area Regulation (9VAC25-220-10 et seq.) states that proceedings to consider the declaration of a surface water management area may be initiated by the Board upon its own motion or upon the request of a municipality within the proposed area or another state agency. The Henrico County Board of Supervisors petitioned the Board to initiate the proceedings to consider the designation of the James River near Richmond a surface water management area. Because of the competing instream and offstream uses of the water in the James River, the Department of Environmental Quality agreed that proceedings should be initiated to determine whether or not the criteria required for designation existed. Based on input from a technical advisory group representing a broad range of interests, it was generally agreed that the James River near Richmond met the required criteria. The preferred alternative for managing the water resource is to designate the area a surface water management area.

Alternative 2: Promote a non-regulatory voluntary agreement between water users. The County of Henrico and the City of Richmond have developed a draft River Management Plan (RMP) that outlines a river water withdrawal schedule designed to reduce withdrawals during times of low flow. The limitations include the reduction of withdrawals for the City of Richmond canals and voluntary and mandatory conservation measures for public water supplies. The RMP only includes withdrawals by the City of Richmond and Henrico County. Under this alternative, there is no authority to enforce compliance with the RMP and there is no review of

any voluntary agreement to assure that it serves the needs of other users in the area or protects instream uses in the area under consideration. The surface water withdrawal management area designation will assure compliance with the RMP or other acceptable voluntary agreements between users. The surface water withdrawal management area designation will also assure that all users in the area produce and implement a water conservation and management plan during times of low flows. It should be noted that the City of Richmond has supported the designation of this surface water management area as a mechanism to foster the implementation of the draft voluntary agreement.

Alternative 3: Promote voluntary water conservation and reduced withdrawals.

DEQ considered promoting voluntary water conservation and reduced withdrawals during periods of low flow. During extreme low flow conditions, the Governor could declare an emergency and require mandatory water use restrictions. Although this alternative would minimize regulatory controls, it would be reactive and it is likely that significant impacts would occur to offstream and instream uses prior to the effects of mandatory water use reductions. This alternative does not promote long-term, proactive water conservation and management actions necessary to protect offstream and instream uses.

When considering these three options, it is the opinion of the Board that the designation of the James River in the Richmond metropolitan area serves the best interest of all parties and is the preferable option for balancing the needs of instream and offstream uses.

Public Comment

Please summarize all public comment received during the NOIRA comment period and provide the agency response.

During the public comment period associated with the NOIRA comments in favor of designation were received from the James River Association, the Falls of the James Scenic River Advisory Board, the City of Richmond, the Virginia department of Game and Inland Fisheries and the Virginia Department of Conservation and Recreation. While each of these organizations support the designation, the majority suggested that a longer river reach be included than the boundaries considered in the draft regulation. Suggestions ranged from expanding the area westward to the Route 15 bridge at Scottsville to including the entire freshwater reach of the James River. DEQ will consider the designation of a westward reach of the James River as a surface water management area subsequent to the decision on the area under current consideration.

Comments in opposition to the designation were received from Henrico County and Zicht Engineering. Both of these organizations state that the best way to address water supply issues in the area under consideration is to foster voluntary cooperative agreements between water users and that the designation of a surface water withdrawal management area would create an unnecessary layer of regulation. As noted in the previous Alternatives section, existing draft voluntary agreements within the area under consideration would only impact two existing users and there would be no mechanism to insure the implementation of the agreement.

Clarity of the Regulation

Please provide a statement indicating that the agency, through examination of the regulation and relevant public comments, has determined that the regulation is clearly written and easily understandable by the individuals and entities affected.

The draft regulation is written clearly and concisely and to the extent possible technical terminology is kept to a minimum. If comments are received during the public comment period indicating a lack of understanding of the draft regulation appropriate changes will be made.

Periodic Review

Please supply a schedule setting forth when the agency will initiate a review and re-evaluation to determine if the regulation should be continued, amended, or terminated. The specific and measurable regulatory goals should be outlined with this schedule. The review shall take place no later than three years after the proposed regulation is expected to be effective.

This draft regulation will be reviewed no later than four years after the effective date, if adopted. Subsequent to the initial review, the regulation will be subjected to routine periodic reviews on a four-year basis.

Family Impact Statement

Please provide an analysis of the proposed regulatory action that assesses the potential impact on the institution of the family and family stability including the extent to which the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

The proposed regulation should have no adverse impacts on family formation, stability or autonomy. However, it could affect the water usage of families using water supplied by the City of Richmond (including water purchased from Richmond by Chesterfield and Hanover Counties) and Henrico (including water purchased by Goochland County). If the designation proceeds, these localities will be required to institute water conservation measures, including voluntary and mandatory conservation measures, during certain times of low flow.

The proposed regulation will have a positive impact on families living in the area by protecting the quantity and quality of their water supply sources. In addition, families who enjoy the recreational opportunities associated with the James River (boating, swimming, fishing, etc.) will also benefit from the protection of instream uses.